IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

VOLVO GROUP NORTH AMERICA, LLCd/b/a VOLVO TRUCKS NORTH AMERICA, *et al*.	)	
Plaintiffs,	)	
	)	Civil Action No. 7:16-cv-00025-EKD
v.	)	
	)	By: Elizabeth K. Dillon
TRUCK ENTERPRISES, INC., *et al*.	)	United States District Judge
Defendants.	)	

MEMORANDUM OPINION AND ORDER

In this action for declaratory and injunctive relief, Volvo Trucks North America, LLC (Volvo) seeks to determine the scope of its contractual and statutory rights of first refusal over the proposed sale of Truck Enterprises, Inc. (TEI), a company which owns and operates commercial truck dealerships. TEI and several of its subsidiary dealerships—TE Roanoke, TE Lynchburg, and TE Hagerstown—sell trucks from Volvo and other manufacturers, including those made by Kenworth Truck Company, a division of PACCAR Inc. (Kenworth). Other of TEI's subsidiary dealerships sell only trucks from manufacturers other than Volvo. The proposed stock sale would transfer TEI's entire business, including the portions unrelated to Volvo, to a third party. For convenience, the court refers to all of the defendants—TEI, the named subsidiaries, and James E. Hartman—collectively as Dealers. Kenworth was permitted to intervene as a plaintiff under Federal Rule of Civil Procedure 24. (Order, Dkt. No. 69.)

Volvo and Dealers agree that Volvo has statutory and contractual rights of first refusal that apply to this proposed sale, but disagree on the scope of those rights. Volvo claims that its rights of first refusal encumber only the portions of Dealers' business related to the sale of

Volvo-related assets, which encompass everything Volvo granted to Dealers under the dealership agreements, and that it may therefore use those rights to purchase only the Volvo-related assets of Dealers. Dealers, on the other hand, claim that the rights of first refusal do not allow Volvo to parcel out the Volvo business from the proposed sale. Instead, they argue, Volvo must stand in the shoes of the buyer and purchase TEI's stock on the terms of the purchase agreement, which would transfer all of Dealers' business to Volvo. Volvo filed this action to resolve this dispute. Kenworth, as intervenor, claims that Volvo's statutory and contractual rights of first refusal do not apply to the proposed sale, and, even if they were to apply, Volvo has no rights of first refusal regarding the Kenworth assets and/or franchise.

Currently before the court are Volvo's and Dealers' cross-motions for summary judgment. The motions have been fully briefed and argued, and are now ripe for disposition. Having considered the parties' briefs and arguments, as well as the applicable law, the court will grant in part and deny in part Volvo's motion for partial summary judgment, and deny the Dealers' motion for summary judgment.

I. BACKGROUND

TEI operates a truck dealership in Harrisonburg, Virginia, and owns a number of subsidiary truck dealerships with locations throughout Virginia, West Virginia, and Maryland. (Compl. ¶ 11, Dkt. No. 1; Hartman Decl. ¶ 4, Dkt. No. 36-3.) Collectively, these dealerships sell trucks from three brands: Volvo, Kenworth, and Isuzu Commercial Truck of America (Isuzu). (Answer ¶ 11.) Volvo trucks are sold at three locations in Virginia (Harrisonburg, Roanoke, and Lynchburg), and in Hagerstown, Maryland. (*Id*.; Hartman Decl. ¶ 2.) The Harrisonburg, Virginia location also has a sub-dealer facility in Keyser, West Virginia. (Hartman Decl. ¶ 2.) Each of the locations that sells Volvo trucks also sells Kenworth trucks. (*Id.*) In the industry,

dealerships that sell vehicles from multiple manufacturers are called "dualed" dealerships. Subsidiary dealerships at the remaining locations sell Kenworth and Isuzu trucks, but not Volvo trucks. (*Id.*; Answer ¶ 11, Dkt. No. 45.) Defendant James E. Hartman is the Chairman, CEO, and majority shareholder of TEI, and the "dealer principal" for TE Roanoke, TE Lynchburg, and TE Hagerstown. (Answer ¶ 17; Hartman Decl. ¶ 2.)

On September 1, 2015, Dealers each entered into a Dealer Sales & Service Agreement (the dealership agreement(s)) with Volvo. (Answer ¶ 23; Dealership Agreement, Compl. Exs. 1–4.) The dealership agreements appoint Dealers as independent, authorized retail dealers of Volvo Trucks products and set out the respective rights and responsibilities of Volvo and Dealers. The dispute in this case centers on Article 9 of the dealership agreement, which discusses dealership transfer and succession rights and grants Volvo a right of first refusal over the sale of each dealership. (*Id.* at 47.) The precise terms of that right are discussed in Section II.B., *infra*. Virginia law, where applicable, also grants a statutory right of first refusal to vehicle manufacturers that applies "[n]otwithstanding the terms of any franchise agreement." Va. Code § 46.2-1569.1. The terms of that statute are described in Section II.C., *infra*.

On December 18, 2015, Hartman and TEI entered into a Stock Purchase Agreement (the purchase agreement) with Transport Equipment Company, Inc. (TEC), another commercial truck dealer.[1] (Purchase Agreement, Compl. Ex. 5) That agreement contemplates a stock sale of TEI and all of its subsidiaries to TEC, including the dualed subsidiaries that sell trucks from Volvo and other manufacturers and subsidiaries that do not sell Volvo trucks at all. (*Id.*) The purchase agreement provides a purchase price for the shares of stock, with no valuation of the individual Volvo, Kenworth, or Isuzu portions of TEI. (*Id.*)

[1] Because only TEI and Hartman are parties to the stock purchase agreement with TEC, the court's use of the term "Dealers" in this memorandum opinion may not be 100% accurate at times, but it simplifies things. The parties likewise sacrifice accuracy for simplicity in many of their filings.

Upon receiving the purchase agreement, Volvo informed Hartman that it wished to decide whether to exercise its right of first refusal, but could not because the agreement did not show the value of TEI's Volvo business. (Def. Br. Opp. TRO Ex. 1, Dkt. No. 13-1.) Volvo requested that TEI inform it in writing of the consideration TEI would receive "only as to a proposed change of ownership of [TEI's] business as a Volvo Trucks North America Dealer." (*Id*.) Hartman refused, claiming that Volvo's right of first refusal authorized it to purchase TEI's stock on the terms of the purchase agreement with TEC or to waive its right of first refusal, but not to break apart the deal and purchase only the Volvo portions of TEI. (*E.g.*, Compl. Ex. 6, Dkt. No. 20-1.) Dealers represent that the deal with TEC is not viable if it is severed. (*See* Treadway Decl. ¶ 7, Dkt. No. 36-3.)

Volvo filed this suit, claiming that Dealers breached their dealer agreements by entering into the purchase agreement with TEC. (Compl. ¶¶ 88–93.) Volvo seeks both a declaration of its rights under the dealer agreements and Virginia, West Virginia, and Maryland statutes (Compl. ¶ A), and "[i]njunctive relief requiring [Dealers] to provide Volvo with the terms of sale that are specific to [Dealers'] Volvo business . . . so Volvo may receive proper notice . . . and have sufficiently clear information to determine whether to exercise its right[s] of first refusal." (*Id*. ¶ C.) Volvo also moved for a preliminary injunction prohibiting Dealers from going through with the proposed sale pending resolution of the scope of Volvo's rights of first refusal. (*Id*. ¶ B.) Kenworth, noting that its dealership agreements give it rights of first refusal over any bona fide transfer agreement (Compl. in Intervention ¶ 5, Dkt. No. 71), was permitted to intervene. Kenworth wants the sale to TEC to proceed as TEC is an experienced Kenworth dealer (*id.* ¶ 7), but does not want Volvo to have rights of first refusal over any of its assets and especially not its three single-line dealerships that are owned and operated by TEI. (*Id.* ¶ 9.) After two hearings

on Volvo's motion, this court granted Volvo a prohibitory preliminary injunction. The injunction suspended the periods for Volvo to exercise its contractual and statutory rights of first refusal, and stayed the proposed sale of the dealerships. (Order, Dkt. No. 70.) However, the court denied a mandatory injunction requiring Dealers to provide value information for the Volvo portion of the stock purchase agreement. (*Id.*)

Volvo subsequently moved for partial summary judgment on its requests for declaratory and permanent injunctive relief. (Pl. Mot. Summ. J. 1, Dkt. No. 88.) It noted at the hearing that this is a partial motion because it does not address issues regarding a valuation of the Volvo portion of the Dealers' business. Dealers filed a cross-motion for summary judgment, asking the court to dissolve the preliminary injunction and award it damages "occasioned by [Volvo's] improper actions in delaying completion of the transaction [with TEC]." (Def. Br. Supp. Summ. (Def. Br.) J. 29, Dkt. No. 89-1.)[2]

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Here, neither Volvo nor Dealers contends that material facts are in dispute, and the court agrees. Instead, each raises issues of statutory and contractual interpretation, which will be decided as a matter of law. *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 471 (4th Cir. 2011) (statutory interpretation); *Homeland Training Ctr., LLC v. Summit Point*

[2] Dealers do not challenge this court's declaratory judgment jurisdiction, and, in any event, the prerequisites for such jurisdiction are clearly satisfied here. *See Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 592 (4th Cir. 2004) (noting that a federal court may properly exercise jurisdiction in a declaratory judgment case where (1) the complaint alleges an actual controversy between the parties; (2) the court possesses an independent basis for jurisdiction over the parties; and (3) the court does not abuse its discretion in the exercise of jurisdiction).

Auto. Research Ctr., 594 F.3d 285, 290 (4th Cir. 2010) (contractual interpretation). Since both Volvo and Dealers move for summary judgment, the court must "consider each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Defenders of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 392 (4th Cir. 2014) (quoting *Bacon v. City of Richmond*, 475 F.3d 633, 638 (4th Cir. 2007)).

B. Volvo's Contractual Right of First Refusal

The court must first determine what law applies to the interpretation of the dealership agreements. As a federal court sitting in diversity, this court applies Virginia's choice of law rules. *Hitachi v. Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 623–24 (4th Cir. 2014) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941)). "Virginia law looks favorably upon choice of law clauses in a contract, giving them full effect except in unusual circumstances." *Id.* at 624. Article 11.7, the dealership agreements' choice of law provision, provides that they are "governed by and construed under the laws of the state where the Dealer's principal place of business is located." TE Hagerstown's principal place of business is in Maryland, and TEI, TE Roanoke, and TE Lynchburg are all located in Virginia. (Hartman Decl. ¶ 2.) TEI also "maintains a companion parts and service location in Keyser, West Virginia," (*id.*), but that location does not have a separate franchise agreement with Volvo and is merely a sub-dealer location under a TEI dealer agreement which is governed by Virginia law. The parties do not argue that West Virginia law applies with regard to contract interpretation, and the court agrees. The court therefore construes these dealership agreements under Virginia and Maryland law.

Volvo and Dealers agree that the provisions of the dealership agreement discussing Volvo's right of first refusal are unambiguous. (Pl. Br. Supp. Summ. J. (Pl. Br.) 19, Dkt. No. 88-

1; Def. Br. 12.) However, they offer different interpretations of those provisions. Volvo claims that its right of first refusal under the dealership agreement encumbers only Volvo assets, including TEI's tangible and intangible Volvo-related property, and not TEI's Kenworth and Isuzu business. Dealers, on the other hand, claim that the agreement only authorizes Volvo to purchase TEI's stock on the terms of the purchase agreement or waive their right of first refusal. To declare Volvo's rights under the dealership agreement, the court must resolve this dispute.

The principles governing contract interpretation are well-established in Maryland and Virginia. In Virginia, although the meaning of an ambiguous contract provision is a question of fact to be resolved by the jury, interpretation of unambiguous contract terms is a question of law appropriately resolved by the court on summary judgment. *Musselman v. Glass Works, L.L.C.*, 533 S.E.2d 919, 921 (Va. 2000). "[T]he primary focus in considering disputed contractual language is for the court to determine the parties' intention, which should be ascertained, whenever possible, from the language the parties employed in the contract." *Va. Elec. & Power Co. v. Norfolk S. Ry. Co.*, 683 S.E.2d 517, 525 (Va. 2009). Thus "when the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning." *TravCo Ins. Co. v. Ward*, 736 S.E.2d 321, 325 (Va. 2012) (quoting *Barber v. VistaRMS, Inc.*, 634 S.E.2d 706, 712 (2006)). Furthermore, contracts must be interpreted holistically, giving meaning to all provisions of the contract wherever possible. *See TravCo*, 736 S.E.2d at 325 ("No word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly."). The same principles apply under Maryland law. *See Gresham v. Lumbermen's Mut. Cas. Co.*, 404 F.3d 253, 260 (4th Cir. 2005) (summarizing Maryland's principles of contract interpretation).

In light of these principles, analysis of Volvo's right of first refusal must start with the language of the section that creates it: Article 9 of the dealership agreement, titled "Dealership Transfer and Succession Rights." Section 9.1 defines a "Dealership Transfer" as "any proposed sale or other transfer of all or any part of the stock of the Dealership or any significant part of the assets of the Dealership," or "any change in Controlling Individual(s)." "Dealership" is defined elsewhere as "the business operations of the Dealer, including the Dealer's primary location and any Sub-Dealer locations . . . through which the Dealer sells products and otherwise discharges its obligations under this Agreement." (Dealership Agreement 10.) By definition then, "Dealership Transfer" covers both a stock sale and a sale of a "significant part of the assets." There is no question that the proposed sale contemplated by the purchase agreement constitutes a "Dealership Transfer."

Volvo's right of first refusal is described in Section 9.3. Section 9.3.1 of the dealership agreement grants "the Company"—that is, Volvo—"a right of first refusal for any bona fide Dealership Transfer offer (the 'Offer')." The section goes on to describe what exactly constitutes a bona fide Offer:

> To be a bona fide Offer that is valid upon Company, the Offer shall: include all material terms and conditions that enable Company to know the value of the Company assets to be sold. A submission of proposed sale terms that are co-mingled with other assets of Dealer shall not constitute a bona fide Offer that is valid upon Company.

(Dealership Agreement 47–48.) The next two sections describe the procedure for exercising the right of first refusal. Section 9.3.2 requires Volvo to give Dealers written notice of its intent to exercise its right within 60 days. Section 9.3.3, entitled "Purchasing Assets," states: "If the

Company exercises its right of first refusal, it shall purchase the assets or other interests specified in the Offer on the terms and conditions of the Offer . . . ." (*Id.* at 48.)

Finally, Section 9.3.5, titled "In Case of Dealer Violation," describes certain actions that constitute a breach of the dealership agreement, including "signing an agreement not subject to the Company's rights under [Article 9]." That section also provides Volvo remedies for breach: Volvo may terminate the agreement, refuse to acknowledge the transferee as an authorized dealer, exercise its right of first refusal notwithstanding the timing provisions of Section 9.3.2, and obtain equitable relief in court "to compel the recognition of Company's right of first refusal, or the performance thereof . . . ." (*Id.*)

The clear intent of these sections is for Volvo's right of first refusal to encumber "Company assets." Because the right applies to "Offers"—that is, bona fide Dealership Transfer offers—the first question when an offer is made is whether the offer "include[s] all material terms and conditions that enable Company to know the value of the Company assets to be sold," and whether it "co-mingles" those assets with "other assets of Dealer." (*Id.* at 47–48.) If the purchase agreement lets Volvo know the value of "Company assets" and does not comingle, it is a bona fide offer, and Sections 9.3.2 and 9.3.3 explain how Volvo can exercise its right of first refusal. Otherwise, if the agreement is not a bona fide offer, then it is "an agreement not subject to the Company's rights under [Article 9]," and Section 9.3.5 provides Volvo remedies. Under this scheme the opportunity to step into the shoes of a prospective buyer per Section 9.3.3 arises only with respect to bona fide offers for the purchase of un-mingled "Company assets."

So the court must determine what "Company assets" means. "Company assets" is not defined in the dealership agreement, and although the parties agree that the term is unambiguous, they disagree on its meaning. (Def. Br. 12; Pl. Br. 11–17). Volvo contends that "Company

assets" describes tangible and intangible assets related to Dealers' Volvo business, like Volvo products and components, Dealers' "blue sky,"[3] and Dealers' authorization to operate as Volvo dealers; in other words, the rights provided by the dealership agreement. (Pl. Reply Br. 3–4.) Dealers take a much narrower view. They argue that "Company assets" must mean assets that Volvo still owns—such as Volvo trucks that Dealers have not yet purchased—because assets that have been purchased by Dealers are "Dealer assets," not "Company assets." Under Dealers' reading of the term, "Company assets" means assets that Dealers have that are still owned by Volvo. For example, Dealers might have "Company assets" if they have some Volvo trucks on the lot that they have yet to purchase. Under this reading, Dealers argue, the proposed stock sale does not include any "Company assets." (*See* Def. Br. 18 ("The value of Volvo Trucks' assets within TEI is $0.").)

That the parties disagree on the meaning of "Company assets" does not necessarily preclude summary judgment because "opposing interpretations [of a contract] do not necessarily render the contract ambiguous." *Babcock & Wilcox Co. v. Areva NP, Inc.*, 788 S.E.2d 237, 244 (Va. 2016) (citing *Bartolomucci v. Federal Ins.*, 770 S.E.2d 451, 456 (Va. 2015)); *accord Huggins v. Huggins & Harrison, Inc.*, 103 A.3d 1133, 1140 (Md. Ct. Spec. App. 2014) (noting that an agreement does not "become ambiguous merely because two parties, in litigation, offer different interpretations of its language") (citing *Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 929 A.2d 932, 952 (Md. 2007)). Instead, a contract term is only ambiguous where, considering the term in context, "it is susceptible to more than one reasonable interpretation." *Weber v. Life Ins. Co. of N. Am.*, 836 F. Supp. 2d 427, 433 (W.D. Va. 2011) (quoting *Neuma Inc. v. AMP, Inc.*, 259 F.3d 864, 873 (7th Cir. 2001)); *see also Dumbarton*

[3] Volvo defines Dealers' "blue sky" as "a subjective capitalized value placed on business goodwill, such as Defendants' contract rights, [their] customer lists and ongoing customer relations, the Defendants' trade name and their reputation in the market." (Pl. Reply Br. 4.)

Improvement Ass'n v. Druid Ridge Cemetery Co., 73 A.3d 224, 233 (Md. 2013); *Babcock, Inc.*, 788 S.E.2d at 244. Accordingly, an alternative but unreasonable interpretation of a contract term does not preclude summary judgment. *See Foothill Capital Corp. v. E. Coast Bldg. Supply Corp.*, 259 B.R. 840, 846 (E.D. Va. 2001) (finding a contract term unambiguous where a party's conflicting interpretation would render that term "completely meaningless").

The construction Dealers urge is not reasonable in light of the contract as a whole. By limiting "Company assets" to assets that Volvo still owns, Dealers would render Volvo's right of first refusal meaningless. A right of first refusal is a buyer's right to purchase something before it is sold to a third party. *See Right of First Refusal*, Black's Law Dictionary (10th ed.) (defining a right of first refusal as "[a] potential buyer's contractual right to meet the terms of a third party's higher offer"). Of course, for such a right to mean anything, it must apply to something that Dealers can sell and that Volvo can buy. But Dealers cannot sell, and Volvo cannot buy, property that Volvo already owns. *See, e.g.*, *Brophy v. Cincinnati, N. O. & Tex. Pac. Ry.*, 855 F. Supp. 213, 216 (S.D. Ohio 1994) ("A tired yet valid maxim of the property law is that one cannot sell what one does not own."). Thus, by interpreting "Company assets" to mean assets that Volvo already owns, Dealers would limit Volvo's right of first refusal to property that it cannot encumber. This interpretation would controvert the parties' clear intent to grant Volvo a meaningful right of first refusal. *See, e.g.*, *Pocahontas Mining LLC v. CNX Gas Co.*, 666 S.E.2d 527, 531 (Va. 2008) ("In determining whether disputed contractual terms are ambiguous . . . [n]o word or phrase employed in a contract will be treated as meaningless if a reasonable meaning can be assigned to it . . . .") (citations omitted); *see also Priority Auto Grp., Inc. v. Ford Motor Co.*, 757 F.3d 137, 142 (4th Cir. 2014) ("[A] right of first refusal is included in a contract for the benefit of the person who is given the right.") (alterations in original) (quoting *Firebaugh v.*

Whitehead, 559 S.E.2d 611, 615 (Va. 2002)); *Landa v. Century 21 Simmons & Co.*, 377 S.E.2d 416, 419 (Va. 1989).

Dealers' interpretation of the contract would also lead to the strange result that Volvo's right of first refusal, which exists under its dealership agreement, covers rights and assets conveyed to Dealers under their franchise agreements with other manufacturers. For example, Volvo could use its right of first refusal to purchase rights that Dealers have by virtue of their Kenworth franchise agreements, although those rights are clearly not contemplated by the dealership agreements. And some of those other franchise agreements, such as Kenworth's, include rights of first refusal. This strange result further supports the conclusion that Dealers' reading is not what the parties intended.

Volvo's interpretation, on the other hand, gives proper effect to the right of first refusal. Under Volvo's reading, the right encumbers assets that Dealers own and can therefore sell, but in which Volvo has an interest—the kind of assets that a right of first refusal would ordinarily encumber. *See Crivelli v. GMC*, 215 F.3d 386, 390 (3d Cir. 2000) (noting that a manufacturer's right of first refusal "provide[s] a mechanism by which the franchisor can control the selection of its franchisees . . ."). Because Section 9.3 functions as a viable right of first refusal only under Volvo's interpretation of "Company assets," the court agrees that this interpretation gives the term its only reasonable meaning. Therefore, the court concludes that the dealership agreement unambiguously confers on Volvo a right of first refusal that encumbers the Volvo portion of Dealers' business.

Dealers offer several arguments as to why Volvo may only exercise its right of first refusal on the terms of the purchase agreement—that is, by purchasing all of TEI's stock—despite this interpretation of "Company assets." First, Dealers claim that because TEI is selling

stock, not Volvo assets, there are no "Company assets to be sold," so the sale complies with the requirements of Section 9.3.1. However, this argument lacks foundation in the terms of the agreement. By granting Volvo a right of first refusal over "*any* bona fide *Dealership Transfer* offer" (Dealership Agreement 47) (emphasis added), and defining "Dealership Transfer" to include both asset and stock sales (*see id.*), the agreement plainly contemplates that the prohibition on co-mingling Volvo assets applies regardless of the mechanism by which ownership is transferred.[4]

Dealers also argue that allowing Volvo to parcel out Dealers' Volvo business from the proposed sale runs counter to Section 9.3.3, which requires Volvo to exercise its right of first refusal by purchasing "the assets or other interests specified in the Offer on the terms and conditions of the Offer." While this is a reasonable reading of 9.3.3 in isolation, it fails to consider the provision in context. *See Babcock*, 788 S.E.2d at 244 ("[W]hen considering the meaning of any part of a contract, we will construe the contract as a whole, striving not to place emphasis on isolated terms wrenched from the larger contractual context.") (citations omitted); *United States Life Ins. Co. v. Wilson*, 18 A.3d 110, 121 (Md. Ct. Spec. App. 2011). As discussed, 9.3.3 does not apply to any purchase offer, only to an "Offer" as described by 9.3.1. By definition, an "Offer" cannot include Volvo assets "co-mingled" with Dealer assets: the requirements of 9.3.1 are built into that term. By requiring Volvo to exercise its right of first refusal as to the whole of an admittedly co-mingled stock sale, Dealers would bypass 9.3.1 and render that section meaningless.

[4] *Cf. Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1347 (Fed. Cir. 2004) (noting that "a distinction between a transfer of ownership involving stock and assets would elevate form over substance. The economic forms of a change of ownership are often interchangeable."); *Caddo Valley R.R. Co. v. Surface Transp. Bd.*, 512 F.3d 1021, 1024 (8th Cir. 2008) (rejecting an attempt to avoid a statutory right of first refusal by claiming that a stock sale was not a sale of the assets encumbered by the right).

Finally, Dealers argue that the prohibition on co-mingling Company with Dealer assets in 9.3.1 must not mean that Dealers cannot sell Volvo assets along with assets from other manufacturers because Volvo has allowed dualed dealerships for decades. However, contrary to Dealers' suggestion, these positions are not inconsistent. First, Virginia law prevents manufacturers from requiring a dealer to be a single-line franchise. Va. Code § 46.2-1569(7b). The transfer of a dealership, not the operation of a dealership, triggers Volvo's right of first refusal under the dealership agreement. *See Landa*, 377 S.E.2d at 420 (noting that a right of first refusal "has no binding effect unless the offeror decides to sell"). Accordingly, Dealers triggered the obligation not to co-mingle Volvo assets in a proposed sale when they entered into the agreement with TEC. Volvo's conduct in allowing dualed dealerships has no bearing on the scope of Volvo's contractual right of first refusal, and Dealers have cited nothing to the contrary.

For these reasons, the court concludes that the dealership agreement grants Volvo a right of first refusal that encumbers only the Volvo-related portions of Dealers' business. What specific assets are included within that right is not before the court. Thus, the court hereby DECLARES Volvo's rights under the dealership agreement as follows:

- The purchase agreement is a Dealership Transfer pursuant to Article 9 of the dealership agreement;
- The purchase agreement is not a bona fide Offer that is valid upon Volvo because it does not include all material terms and conditions than enable Volvo to know the value of the Volvo assets to be sold and because the proposed sale terms are co-mingled with other assets of the Dealer;

- Dealers breached the dealership agreement by signing the purchase agreement which is not subject to Volvo's rights under Article 9 of the dealership agreement, and this breach allows Volvo to pursue the remedies set forth in section 9.3.5 of the dealership agreement;
- Volvo has a contractual right of first refusal that it may exercise with regard to Dealers' Volvo business because of the breach of the dealership agreement;
- In order for Volvo to determine whether it will exercise its right of first refusal, Dealers must provide, and Volvo is entitled to know, the price that TEC is to pay for Dealers' Volvo business and what assets or interests TEC is to acquire, separate and apart from the other assets or interests such as the Kenworth and Isuzu businesses;
- The deadline for when Volvo must declare to Dealers its election to exercise the right of first refusal does not commence until Dealers provide Volvo: (a) the price that Volvo or its assignee is to pay for Dealers' Volvo business; and (b) the actual assets or interests that Volvo or its assignee will acquire should the right of first refusal be exercised; and
- Volvo has no right of first refusal over Dealers' Kenworth and Isuzu businesses.

C. Volvo's Statutory Right of First Refusal

The contractual analysis does not end the court's inquiry because the contractual rights may be affected by Virginia, Maryland, and/or West Virginia statutes regarding manufacturers' rights of first refusal.

First, it appears that the relevant West Virginia statute, West Virginia Code § 17A-6A-10(2)(q), would not apply here because the choice of law provision in the applicable dealership agreement provides that Virginia law governs. The parties agree that TEI's West Virginia

location is a sub-dealership of the Harrisonburg, Virginia location, and Volvo's rights thereunder are governed by Virginia law. (Pl. Br. n.50; Def. Br. 17.) An analysis of case law supports this. In *Pyott-Boone Elecs., Inc. v. IRR Trust for Donald L. Fetterolf Dated December 9, 1997*, 918 F. Supp. 2d 532, 545 (W.D. Va. 2013), the court found that language in a similar choice of law clause between two sophisticated commercial entities, under which Delaware law governed the terms of an agreement, was broad enough to encompass all disputes arising from or related to the agreement. *Id.* at 547. The court agrees with that case's analysis and finds that the parties meant for disputes arising from the agreement regarding the West Virginia sub-dealer location, including the exercise of rights of first refusal, to be governed by Virginia law. Accordingly, West Virginia Code § 17A-6A-10(2)(q) is inapplicable. In any event, that statute does not create a right of first refusal, but merely restricts a manufacturer's right to exercise a contractual right of first refusal in situations that are inapplicable here, so it would not affect the court's analysis.

The choice of law provision for one of the dealership agreements provides that Maryland law governs. Like the West Virginia statute, Maryland's statute regarding a manufacturer's right of first refusal does not create a right beyond the one set forth by contract. Md. Code Ann. Transp. § 15-211(d)(2). The statute merely limits contractual rights of first refusal in certain scenarios that do not exist here and provides for payment of certain expenses.

The court now turns to Volvo's statutory right of first refusal under Virginia law. As with Volvo's contractual right, the parties agree that Virginia Code § 46.2-1569.1 grants Volvo a statutory right of first refusal, but disagree on the scope of that right. Volvo argues that Virginia law provides each manufacturer a right of first refusal only over the property that is subject to its dealer agreement. (Pl. Br. 28.) Dealers argue, on the other hand, that the statute only authorizes

Volvo to purchase TEI's stock on the terms of its deal with TEC. (Def. Br. Opp'n 18, Dkt. No. 95.)

The proper interpretation of a statute is a question of law. *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 242–43 (4th Cir. 2009); *Conyers v. Martial Arts World of Richmond, Inc.*, 639 S.E.2d 174, 178 (Va. 2007). When called to interpret a Virginia statute, a federal court sitting in diversity must interpret the statute from the perspective of the Supreme Court of Virginia. *See Wells v. Liddy*, 186 F.3d 505, 527–28 (4th Cir. 1999); *Atl. Mach. & Equip., Inc. v. Tigercat Indus.*, 419 F. Supp. 2d 856, 859 (E.D. Va. 2006); *Compton v. Nationwide Mut. Ins. Co.*, 480 F. Supp. 1254, 1256 (W.D. Va. 1979). Under Virginia law, the court's interpretation starts with the plain language of the statute. *See, e.g.*, *Conyers*, 639 S.E.2d at 178.

In relevant part, § 46.2-1569.1 reads:

> **Manufacturer or distributor right of first refusal**
>
> Notwithstanding the terms of any franchise agreement, in the event of a proposed sale or transfer of a dealership, the manufacturer or distributor shall be permitted to exercise a right of first refusal to acquire the new vehicle dealer's assets or ownership, if such sale or transfer is conditioned upon the manufacturer's or dealer's entering into a dealer agreement with the proposed new owner or transferee, only if all the following requirements are met:
> 1. To exercise its right of first refusal, the manufacturer or distributor must notify the dealer in writing within 45 days of its receipt of the completed proposal for the proposed sale or transfer;
> 2. The exercise of the right of first refusal will result in the dealer's and dealer's owner's receiving the same or greater consideration as they have contracted to receive in connection with the proposed change of ownership or transfer;
> . . . .
>
> 4. The manufacturer or distributor agrees to pay the reasonable expenses, including attorney's fees which do not exceed the usual, customary, and reasonable fees charged for similar work done for other clients, incurred by the proposed new owner and transferee prior to the manufacturer's or distributor's exercise of its right of

> first refusal in negotiating and implementing the contract for the proposed sale or transfer of the dealership or dealership assets . . . .

Va. Code § 46.2-1569.1. While the statute creates a right of first refusal and establishes the general procedure and conditions for it, it is silent on the scope of that right where, as here, the proposed sale bundles the manufacturer's business with business of other manufacturers by including dualed dealerships and single-line dealerships different from the manufacturer wanting to exercise the right. The Supreme Court of Virginia has never discussed the statute, and no other case has addressed this issue.[5]

Since the Supreme Court of Virginia has not spoken on the proper interpretation of this statute, the court must "opine how the Supreme Court of Virginia would construe the provision." *Atl. Mach. & Equip.*, 419 F. Supp. 2d at 859; *see Private Mortg. Inv. Servs. v. Hotel & Club Assocs.*, 296 F.d 308, 312 (4th Cir. 2002); *Wells*, 186 F.3d at 527–28; *Perdue v. Sears, Roebuck & Co.*, 523 F. Supp. 203, 205 (W.D. Va. 1981). In so doing, the court may consider, among other things, "canons of construction, restatements of law, treatises, recent pronouncements of general rules or policies by the state's highest court, well considered dicta, and the state's trial court decisions." *Wells*, 186 F.3d at 528. "[C]ases from other jurisdictions can also provide guidance," *Goulmamine v. CVS Pharm., Inc.*, 138 F. Supp. 3d 652, 662 (E.D. Va. 2015), as can the court's own "common sense and guided logic." *Atl. Mach. & Equip.*, 419 F. Supp. 2d at 859.

Virginia's canons of statutory construction are well established. When construing a statute, the Supreme Court of Virginia seeks to "apply the interpretation that will carry out the legislative intent behind the statute." *Prop. Damage Specialists, Inc. v. Rechichar*, 790 S.E.2d 237, 238 (Va. 2016) (quoting *Conyers*, 639 S.E.2d at 178); *see Luttrell v. Cucco*, 784 S.E.2d 707,

[5] The Fourth Circuit discussed the statute in another context. *See Priority Auto Grp., Inc. v. Ford Motor Co.*, 757 F.3d 137, 143–44 (4th Cir. 2014) (holding that a prospective buyer of a dealership was without standing and that franchisor did not tortiously interfere with proposed sale by exercising its right of first refusal).

710 (Va. 2016) (noting that words of a statute should generally receive "their ordinary acceptance and significance, where such construction is consonant, and not at variance, with the purpose of the statute") (quoting *Rountree Corp. v. Richmond*, 51 S.E.2d 256, 260–61 (Va. 1949)). The Supreme Court of Virginia favors "permissible interpretation[s] that further[] rather than obstruct[] the statute's purpose." *Luttrell*, 784 S.E.2d at 710; *see also Norfolk So. Ry. Co. v. Lassiter*, 68 S.E.2d 641, 643 (Va. 1952) ("The statute should have a rational construction consistent with its manifest purpose, and not one which will substantially defeat its object."). Accordingly, the court will interpret this statute to advance the legislative purposes behind providing manufacturers a statutory right of first refusal.

A few cases have discussed the purpose of rights of first refusal in the vehicle manufacturer-dealer context. The Fourth Circuit, discussing Virginia Code § 46.2-1569.1, has suggested that the right of first refusal created in the statute exists for the benefit of manufacturers. *Priority Auto Grp., Inc. v. Ford Motor Co.*, 757 F.3d 137, 142 (4th Cir. 2014) (citing *Firebaugh*, 559 S.E.2d at 615). Other cases have generally recognized that such rights balance the interests of the manufacturer in controlling its franchise network with the interests of the franchisee in conducting its business reasonably free from manufacturer interference. *See Crivelli v. GMC*, 215 F.3d 386, 390 (3d Cir. 2000) ("Both a right of first refusal and a consent requirement provide a mechanism by which the franchisor can control the selection of its franchisees, but a right of first refusal is a less restrictive form of control, as it requires that the franchisor match the terms offered for the franchise by the third party."); *Paccar Inc. v. Elliot Wilson Capitol Trucks LLC*, 923 F. Supp. 2d 745, 760–61 (D. Md. 2013) (discussing Md. Code Ann. Transp. § 15-211); *cf. Rosado v. Ford Motor Co.*, 337 F.3d 291, 294–95 (3d Cir. 2003)

(indicating that rights of first refusal protect dealers "by creating two prospective purchasers for every offer they receive").

Although the Supreme Court of Virginia has not spoken on the legislative purposes of this statute specifically, it has discussed the general policies underlying rights of first refusal. In *Landa v. Century 21 Simmons & Co.*, 377 S.E.2d 416 (Va. 1989), the Landas entered into a contract with the executor of an estate, which granted the Landas a right of first refusal over a 17-acre tract of land from the estate. *Id.* at 417–18. Thereafter, the executor entered into a contract to sell the 17-acre tract, along with a 1.9-acre tract owned by the executor in his personal capacity, to a third party. *Id.* at 418–19, 421. The Landas sued, seeking to exercise their right of first refusal as to the 17-acre parcel of land only. *Id.* at 417, 419.

The court held that the Landas could exercise their right of first refusal as to the 17-acre tract alone. In reaching that conclusion, the court described the function of rights of first refusal—to allow the holder of that right an opportunity to purchase encumbered property before it is sold to someone else—and distinguished the right from an option. *Id* at 419–20. The court also noted that "a right of first refusal is inserted in a contract for the benefit of the person who is given the right and that it must, therefore, be interpreted with that purpose in mind." *Id.* at 419; *accord Quality Props. Asset Mgmt. Co. v. Trump Va. Acquisitions, LLC*, 3:11-cv-53, 2012 U.S. Dist. LEXIS 115225, at *43 (W.D. Va. Aug. 16, 2012); *Firebaugh*, 559 S.E.2d at 615.

The *Landa* court rejected as "plainly wrong" the argument that the Landas could not exercise their right of first refusal as to the 17-acre tract because the contract with the third party involved both the 17-acre parcel and the additional 1.9-acre parcel. *Id.* at 421. Were this the law, the court reasoned, "a person in [the executor's] position could always defeat a right of first refusal by contracting with a purchaser who agreed to buy slightly more land than covered by the

right of first refusal." *Id.* Citing the Eastern District of Virginia, the court noted: "[i]t is universally recognized that the holder of a right of first refusal cannot be compelled to purchase more property than is subject to the right or else forfeit its first refusal rights." *Id.* (quoting *Pantry Pride Enters. v. Stop & Shop Cos.*, 630 F. Supp. 637, 639 (E.D. Va. 1986), *aff'd in part, vacated and remanded in part on grounds not relevant here*, 806 F.2d 1227 (4th Cir. 1986)). Accordingly, the court held that the Landas were entitled to exercise their right of first refusal as to the 17-acre tract, despite the executor's contract with the third party.

In *Pantry Pride*, the case cited favorably in *Landa*, Stop & Shop subleased a commercial property to Pantry Pride. 630 F. Supp. at 637. The sublease allowed Pantry Pride to further assign or sublet its interest in the premises, but granted Stop & Shop a right of first refusal over any such transfer. *Id.* at 638. Pantry Pride entered into an agreement with a third party to sell its leasehold interest in the premises covered by the sublease, along with equipment at that location. *Id.* When Stop & Shop attempted to exercise its right of first refusal as to the leasehold, Pantry Pride refused to honor it, arguing that Stop and Shop could only exercise its right by accepting the assignment of both the leasehold and the equipment. *Id*. The Eastern District of Virginia rejected Pantry Pride's reasoning and held that Pantry Pride could not defeat Stop & Shop's right of first refusal by bundling the encumbered interest with other, unencumbered property. *Id.* at 638–639.

On appeal, the Fourth Circuit agreed, holding that a seller cannot force the holder of a right of first refusal to buy more than the property covered by that provision. *Pantry Pride Enters. v. Stop & Shop. Cos.*, 806 F.2d 1227, 1228–29 (4th Cir. 1986). Like the district court, the Fourth Circuit noted that "[t]he reason for this line of authority is clear: if Pantry Pride could include the lease as part of a package and force Stop & Shop to accept the entire package or

forfeit its right, then Pantry Pride could effectively nullify the right of first refusal by combining the lease with items that Stop & Shop may not want or cannot afford." *Id.* at 1229.

In *Mercedes-Benz USA, LLC v. Star Auto. Co.*, No. 3:11-cv-73, 2011 U.S. Dist. LEXIS 59258 (M.D. Ga. June 3, 2011), the Middle District of Georgia applied the same reasoning to facts similar to those in this case. There, a dealership agreement and state statutes granted Mercedes-Benz a right of first refusal over the sale of Star Auto. *Id.* at *2–3. Star Auto entered into a purchase agreement with third-party buyers, intending to sell the Mercedes-Benz dealership along with Nissan and Volkswagen dealerships. *Id.* at *3–4. Mercedes-Benz sought a temporary restraining order and preliminary injunction in order to allow it to exercise its contractual and statutory rights of first refusal. *Id.* Noting that the deal packaged the Mercedes-Benz dealership with "Nissan and [Volkswagen] dealerships (over which MBUSA has no power)," the court reasoned that the deal likely violated Mercedes-Benz's rights of first refusal under New Jersey and Georgia law. *Id.* at *4–5.

Although none of these cases are directly controlling on the facts here, they establish two general principles regarding Volvo's statutory right of first refusal. First, the right of first refusal provided in § 46.2-1569.1 was enacted for the benefit of automobile manufacturers and should be interpreted as such. *See Landa*, 377 S.E.2d at 419; *see also Priority Auto*, 757 F.3d at 142; *Crivelli*, 215 F.3d at 389–90. Second, a right of first refusal does not function for the benefit of manufacturers—the holders of the right—if dealers can freely bundle encumbered property with unencumbered property and force a manufacturer to buy the whole package or waive its right. *Pantry Pride*, 806 F.2d at 1229; *Landa*, 377 S.E.2d at 421. Moreover, it is also worth noting that *Landa* was the law in 1994, when § 46.2-1569.1 was enacted. "'When the legislature . . . pass[es] a new law or . . . amend[s] an old one, it is presumed to act with full knowledge of the

law as it stands bearing upon the subject with which it proposes to deal.'" *Powers v. Cty. Sch. Bd.*, 139 S.E. 262, 264 (Va. 1927) (quoting *School Bd. v. Patterson,* 69 S.E. 337, 339 (Va. 1910)). The Virginia legislature here passed a statute dealing with rights of first refusal and is thus presumed to act with knowledge of the *Landa* case. Had it wanted to provide for a contrary rule, it could have done so.

With these principles in mind, the court thinks it likely that the Supreme Court of Virginia would conclude that the right of first refusal in § 46.2-1569.1 encumbers only portions of a dealership related to a given manufacturer, not those portions of the sale related to other manufacturers. Thus a manufacturer wishing to exercise its right of first refusal as to the sale of a dualed dealership, or of multiple dealerships selling vehicles from various manufacturers, need not step into the shoes of the buyer and accept the deal in its entirety; it may simply purchase the assets related to the manufacturer for "the same or greater consideration" as the dealer would have received for the transfer of those assets specifically. Va. Code § 46.2-1569.1(2).

Dealers' interpretation of § 46.2-1569.1, which would require manufacturers to purchase on the terms of a purchase agreement regardless of whether the agreement includes business entirely unrelated to the manufacturer, would conflict with the purpose of the statute. *See, Luttrell*, 784 S.E.2d at 710 (noting that a statute should be interpreted to further its legislative intent). First, such an interpretation would effectively nullify the right of first refusal the statute creates, by allowing dealerships to bundle multiple manufacturers into a single sale. Faced with the proposed sale of a dualed dealership, a manufacturer wishing to control its franchises as intended by the statute would have to buy the entirety of the dealership, regardless of whether it included vehicles from other manufacturers which the manufacturer did not want or could not afford. *See Pantry Pride*, 806 F.2d at 1229.

Second, Dealers' interpretation would grant that nullified right to only one of multiple manufacturers involved in a dualed dealership sale. Under this reading, a manufacturer could extinguish the right of first refusal of other manufacturers. For example, if Volvo exercised a right of first refusal as to the whole purchase agreement in this case, Kenworth and Isuzu would lose their ability to do the same. Stated otherwise, a manufacturer's right of first refusal—its right to purchase the encumbered property before a third party does—would be contingent on a third party not purchasing the property first. This outcome would run contrary to the purpose of § 46.2-1569.1 and rights of first refusal generally. *See Priority Auto*, 757 F.3d at 142; *Crivelli*, 215 F.3d at 389–90; *see also Landa*, 377 S.E.2d at 420 (noting that in interpreting a right of first refusal, "the limiting word 'First' . . . indicates that the promise shall be the first party to be given such a power") (quoting 1A A. Corbin, *Corbin on Contracts*, § 261A (1963)).

It is also unclear which manufacturer would receive the statutory right of first refusal under this interpretation. At the motions hearing, Dealers suggested that the right would go to the first manufacturer who sought to exercise it. Were this the case, manufacturers would not have 45 days to exercise their right, as the statute states, *see* Va. Code § 46.2-1569.1(1); they would have only until another manufacturer deprived them of their right by exercising it first. Nothing in § 46.2-1569.1 indicates that a manufacturer's entitlement to the right of first refusal should be contingent on a race to exercise it. This interpretation of the statute, with regard to packaged deals, leads to an absurd result where some manufacturers have their rights of first refusal stripped from them if they are not first to exercise them or if they were not the first manufacturer to be notified of the proposed sale by the dealer. As the Supreme Court of Virginia has made clear, courts should avoid interpreting statutes in ways that produce absurd or irrational

consequences. *Jury v. Giant of Md., Inc.*, 491 S.E.2d 718, 720 (Va. 1997) (quoting *F.B.C. Sotres, Inc. v. Duncan*, 198 S.E.2d 595, 598 (1973)).

On the other hand, a reading which limits the right of first refusal to a single manufacturer's interest in the franchise effectuates the purposes of § 46.2-1569.1. Under this reading, each manufacturer has a right of first refusal as to the portions of the dealership in which it has an interest. *See Crivelli*, 215 F.3d at 389–90. Each manufacturer's ability to exercise that right is not contingent on the nature and value of other assets a dualed dealership purchases, or the speed with which it can exercise the right. Nor can a manufacturer deprive other manufacturers of their right to control their franchises simply by acting first. Because this reading effectuates the intent of the statute, is consistent with case law regarding rights of first refusal when the statute was enacted, and does not lead to the absurd result of providing a right only to the first manufacturer among many, the Supreme Court of Virginia would likely conclude that Virginia Code § 46.2-1569.1 grants a manufacturer a right of first refusal as to a dealer's business related to that manufacturer.

Accordingly, the court concludes that Volvo has a statutory right of first refusal that encumbers only the Volvo-related portions of Dealers' business. The statute gives a manufacturer 45 days from receipt of the completed proposal to exercise its right. In order for manufacturers to meaningfully exercise the right, the proposal would have to include information regarding the amount of the deal allocated to each manufacturer's business before the proposal would be a completed proposal. Again, the court need not clarify the precise assets to which that right extends at this time. The court merely notes that a manufacturer seeking to exercise its right of first refusal under § 46.2-1569.1 need not purchase portions of a dealer's business unrelated to the manufacturer.

For the foregoing reasons, the court hereby DECLARES Volvo's rights under Virginia Code § 46.2-1569.1 as follows:

- The purchase agreement constitutes a proposed sale or transfer of a dealership conditioned upon the manufacturer's or dealer's entering into a dealer agreement with the proposed new owner or transferee and thus Volvo has a statutory right of first refusal over Dealers' Volvo business if it meets the statutory requirements;
- A completed proposal must include the price that TEC is to pay for Dealers' Volvo business and what assets or interests TEC is to acquire, separate and apart from the assets or interests that Dealers otherwise propose to sell to TEC pursuant to statute, such as Dealers' Kenworth and Isuzu businesses;
- If requested by Volvo, Dealers must provide the reasonable incurred expenses of the proposed buyer in negotiating and implementing the purchase agreement as to Dealers' Volvo business only, and Volvo must pay those reasonable expenses;
- The 45 deadline for when Volvo must declare to Dealers its election to exercise the statutory right of first refusal does not commence until Dealers provide Volvo with a completed proposal; and
- Volvo has no statutory right of first refusal over Dealers' Kenworth and Isuzu businesses.

The court further DECLARES that under Md. Code Ann. Transp. § 15-211(d)(3), Volvo must pay the reasonable expenses incurred by the prospective purchaser in negotiating and implementing the purchase agreement as to Dealers' Volvo business only.

D. Permanent Injunction

In its complaint, the only injunctive relief sought by Volvo (other than preliminary relief) was an injunction requiring "Defendants to provide Volvo with the terms of sale that are specific to Defendants' Volvo business and exclusive of Defendants' Kenworth and Isuzu businesses, so Volvo may receive proper notice under the Dealer Agreements [and the statutes] and have sufficiently clear information to determine whether to exercise its right of first refusal." (Compl. ¶ C.) In light of the court's grant of declaratory relief, which includes a declaration that the Dealers are obligated to provide such information, the requested injunctive relief is no longer necessary.

In summary fashion and without citing to any law, Volvo seeks a permanent injunction in its brief enjoining Dealers "from attempting to sell or selling their Volvo business interests, either as part of the Stock Purchase Agreement or in any subsequent buy-sell agreement with TEC or any other third party purchaser when such buy-sell includes Defendants' Volvo business interests and any part of Defendants' other business interests." (Pl. Br. 38.) But, as noted, that relief was not requested in its complaint. Because Volvo summarily seeks relief that it did not request in its complaint, the court DENIES Volvo's motion for summary judgment with regard to its request for a permanent injunction set forth only in its brief.

E. Dealers' Motion for Summary Judgment

Since Dealers also move for summary judgment, the court must consider their motion independently on its merits. *Defenders of Wildlife*, 762 F.3d at 392 (quoting *Bacon*, 475 F.3d at 638). Dealers' motion seeks summary judgment based on its interpretations of the dealership agreement and Virginia Code § 46.2-1569.1. Dealers also assert in their brief that Volvo has breached the dealership agreement by demanding to know the value of the Volvo portion of

Dealers' business. The court has considered Dealers' interpretations of Volvo's contractual and statutory rights of first refusal and rejects them for the reasons stated *supra*. To the extent that Dealers ask the court to declare Volvo in breach of the dealer agreements, Dealers have not counterclaimed for breach of contract or raised breach of contract as an affirmative defense in their answer. For these reasons, the court will deny Dealers' motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, the court hereby GRANTS Volvo's motion for partial summary judgment in part, DENIES Volvo's motion for partial summary judgment in part with regard to its request for injunctive relief, and DENIES Dealers' motion for summary judgment.

Entered: March 31, 2017.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge